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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS
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5 IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
6 PHARMACY CASES LITIGATION)
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14 BEFORE: THE HONORABLE RYA W. ZOBEL AND
15 THE HONORABLE JENNIFER C. BOAL

16 **STATUS CONFERENCE**
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John Joseph Moakley United States Courthouse
Courtroom No. 12
One Courthouse Way
Boston, MA 02210

June 24, 2015
2:00 p.m.

Catherine A. Handel, RPR-CM, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 5205
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16 FOR PAUL D. MOORE, IN HIS CAPACITY AS CHAPTER 11 TRUSTEE OF
17 NECP, INC.:

18 Duane Morris LLP by MICHAEL R. GOTTFRIED, ESQ., 100 High
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20 FOR THE DEFENDANTS:

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24 (Appearances continued on the next page.)

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1 P R O C E E D I N G S

2 (The following proceedings were held in open court before
3 the Honorable Rya W. Zobel, United States District Court Judge,
4 and the Honorable Jennifer C. Boal, Magistrate Judge, United
5 States District Court, District of Massachusetts, at the John J.
6 Moakley United States Courthouse, One Courthouse Way, Boston,
7 Massachusetts, on June 24, 2015.)

8 THE COURT: Good afternoon. Please be seated.

9 COURTROOM DEPUTY CLERK URSO: This is In Re: New
10 England Compounding, MD-13-2419.

11 THE COURT: Good afternoon all.

12 MS. JOHNSON: Good afternoon, your Honor.

13 THE COURT: Let's see. We have Ms. Johnson, Mr.
14 Stranch, not Mr. Sobol, Mr. Chalos -- no.

15 MR. CHALOS: I'm here, your Honor.

16 THE COURT: Yes, Mr. Chalos is here. Mr. Fennell.

17 MR. FENNELL: Right here, your Honor. Good
18 afternoon.

19 THE COURT: Who is that, Lisa?

20 COURTROOM DEPUTY CLERK URSO: Someone must have
21 called in that just got on.

22 THE COURT: And then for the trustee, Mr. Gottlieb.

23 MR. GOTTFRIED: Yes.

24 THE COURT: Okay. And Mr. --

25 MR. ELLIS: Mr. Ellis, your Honor.

1 THE COURT: Are you speaking?

2 MS. DOUGHERTY: It's possible, your Honor. Kim
3 Dougherty on behalf of the Plaintiffs' Steering Committee.

4 THE COURT: Okay. And then we come over here to the
5 creditors. Tell me your name, please. The list is so long, I
6 cannot get through it.

7 MS. GREER: Your Honor, Marcy Greer for the St.
8 Thomas Entities.

9 THE COURT: For?

10 MS. GREER: The St. Thomas Entities.

11 THE COURT: Right.

12 MR. BLUMBERG: Jay Blumberg from Blumberg & Wolk on
13 behalf of the Premier defendants.

14 MS. GIDEON: C.J. Gideon on behalf of the Tennessee
15 Clinic Defendants, your Honor.

16 THE COURT: Okay. And then in the front row?

17 MR. KLARFELD: Joshua Klarfeld on behalf of GDC.

18 MR. RABINOVITZ: Dan Rabinovitz on behalf of Medical
19 Sales Management.

20 MR. GAYNOR: Robert Gaynor on behalf of the
21 individual defendants.

22 MR. TUCKER: Scott Tucker, your Honor, for Ameridose.

23 MR. MORIARTY: Matt Moriarty.

24 THE COURT: I promise you before this case ends, I
25 will remember each and every one of you and your names, maybe.

1 I will start with your agenda, Ms. Johnson, but at
2 some point I propose to take off on my own, but you'll know it.

3 MS. JOHNSON: Thank you, your Honor.

4 THE COURT: So, the motion for approval of the
5 Virginia wrongful death settlements, I assume that's up to
6 you. No? Who is speaking?

7 MS. JOHNSON: No, your Honor. Mr. Fennell will be
8 addressing that for the Plaintiffs' Steering Committee.

9 THE COURT: Okay. I assume it's not going to take an
10 hour.

11 MR. FENNELL: No, your Honor, not today.

12 I'm Patrick Fennell. I represent a number of
13 Virginia plaintiffs and, as you are already aware, Virginia
14 requires approval of all settlements involving allegations of
15 wrongful death.

16 There is a specific notice requirement under Virginia
17 law which requires every statutory beneficiary in each death
18 case to be given notice and an opportunity to be heard. In
19 order to do that properly, we need to have a hearing date
20 sufficiently in advance so that we can issue notice to all of
21 the statutory beneficiaries.

22 THE COURT: My trying to short circuit that by having
23 a hearing today won't work?

24 MR. FENNELL: Yes, ma'am.

25 So, what we are requesting is about an hour of the

1 Court's time sometime on July 9th or 10th, if it suits the
2 Court. All the counsel for plaintiffs and defense counsel
3 have gotten together and those two dates work for all of us.
4 If it is acceptable to the Court, we would like to try and
5 schedule something for one of those two days for an hour so
6 that we can get notice out to all the beneficiaries.

7 THE COURT: Why do we need an hour?

8 MR. FENNELL: Well, there are eight cases, your
9 Honor, eight wrongful death cases, and each one of them,
10 frankly, would probably have to be presented to some extent on
11 an individual basis. So, we're just -- I'm being, I guess,
12 maybe cautious about it taking an hour. It might take 45
13 minutes. If we're really lucky, maybe half an hour.

14 THE COURT: Is there any reason -- first of all,
15 there's no opposition to it, right? It's a joint motion by
16 plaintiffs and defendants?

17 MR. FENNELL: That's correct.

18 THE COURT: Is there any reason why the parties can't
19 give me an outline of what the settlement is and how each of
20 the -- how the settlement satisfies each of the requirements
21 and then you can talk about it?

22 MR. FENNELL: Yes, ma'am. We're planning on filing
23 petitions, individual petitions in each case. Those are going
24 to be filed -- many of them might be filed today, but some
25 might be filed tomorrow or Friday, and each of the petitions

1 will outline who the statutory beneficiaries are.

2 The one thing that we won't know in each case until
3 later this year, probably sometime in October or November, is
4 what the actual payout will be in each case and the breakdown
5 in terms of attorney's fees and that sort of thing.

6 What we're asking the Court for now is an approval of
7 the process by which each case -- each of the wrongful death
8 cases will be evaluated so that we can move forward with the
9 other conditions of our settlement. This was one of the steps
10 that was identified in our settlement agreement with the
11 Virginia defendants. And so, we're asking the Court to
12 basically review that process and give us an approval on that
13 basis.

14 THE COURT: Well, that process is presumably the same
15 for each of the parties.

16 MR. FENNELL: That's true.

17 THE COURT: So, we can deal with it as one.

18 MR. FENNELL: Yes.

19 THE COURT: And then we come back in October, or
20 whenever. We review the individual verdict or the settlement
21 amounts.

22 MR. FENNELL: What we will be asking the Court to
23 do -- when we come back in October, what we will be asking the
24 Court to approve -- and, again, this is a requirement under
25 Virginia law -- to approve the dispersement, a proposed

1 dispersement in each of the cases.

2 THE COURT: Our next hearing here is to be in August.
3 Do you want to do it before then?

4 MR. FENNELL: Yes, ma'am. And the reason for that is
5 because of the structure of the Virginia settlements, we --
6 there's a particular deadline or -- July 10th is a significant
7 date in the settlement because that is the date after which we
8 can transfer the settlement funds into escrow and that would
9 allow -- if we have the Court's preliminary approval of the
10 process by that date, that would allow things to move forward
11 more quickly.

12 THE COURT: Lisa, what are we doing on the --

13 COURTRoom DEPUTY CLERK URSo: We could do the morning
14 of the 8th or 9th, Judge. We have afternoon court.

15 (Discussion off the record at the Bench.)

16 MR. FENNELL: If I said July 8th or 9th, I was
17 mistaken. I meant --

18 THE COURT: You said 9th or 10th.

19 MR. FENNELL: Nine or ten, yes, ma'am.

20 (Discussion off the record at the Bench.)

21 THE COURT: How about 9 o'clock in the morning on the
22 9th?

23 MR. FENNELL: That would be fine, your Honor.

24 THE COURT: Okay. But I don't anticipate it will
25 take an hour.

1 MR. FENNELL: Yes, ma'am. We will do our best to
2 keep it to a half an hour or so.

3 THE COURT: How about 25 minutes?

4 MR. FENNELL: 24 minutes, your Honor.

5 THE COURT: Don't worry about it. Okay.

6 MS. JOHNSON: The second item on the agenda, your
7 Honor, is the Wayne Reed motion to set case for trial. George
8 Nolan to my right will be addressing that motion. Because
9 there was a question asked in one of the responses, I did want
10 to state from the start that the PSC fully supports Mr. Reed's
11 motion.

12 MR. NOLAN: Good afternoon, your Honor.

13 THE COURT: There arrived today -- no. That came to
14 me -- this is an old motion. Go ahead. I'm sorry, I'm
15 looking at an old motion.

16 MR. NOLAN: Your Honor, I'm George Nolan from
17 Nashville. I represent a gentleman named Wayne Reed.

18 THE COURT: Where do you anticipate this trial that
19 you're asking for is going to take place?

20 MR. NOLAN: Your Honor, unless the defendants are
21 willing to waive lexicon, we would anticipate it would take
22 place in Nashville, in the Middle District of Tennessee.

23 THE COURT: Well, how can I set a trial in Nashville?

24 MR. NOLAN: I think that would have to be done, your
25 Honor, in coordination with the Chief Judge of the Middle

1 District of Tennessee. So, there would have to be some
2 coordination in that regard.

3 Our concern, your Honor, is that Mr. Reed's wife died
4 more than two and a half years ago and they've been married
5 for 36 years and, unfortunately, Mr. Reed suffers from ALS,
6 also known as Lou Gehrig's Disease.

7 THE COURT: I read the papers. I understand what a
8 sad case it is.

9 Can I just pass it? Because I have some suggestions
10 to deal with it in the big picture. So, forgive me, but I
11 would like to come back to it.

12 MR. NOLAN: Certainly, your Honor.

13 THE COURT: So, the next item, the motions to
14 withdraw.

15 MS. JOHNSON: Yes, your Honor. There have been a
16 series of motions filed by the affiliated defendants to
17 withdraw.

18 THE COURT: Do you have any objections to the
19 Tennessee Clinics' suggestion as to how this be done?

20 MS. JOHNSON: I think, if what the Court is referring
21 to, that there needs to be successor counsel identified, we
22 agree with that.

23 THE COURT: Well, people that they can talk to, that
24 people can talk to, so that they don't just disappear.

25 MS. JOHNSON: Yes, but, your Honor, I think if you

1 look at Local Rule 83.5.2, there's actually a requirement that
2 counsel be identified. That rule provides that the Court will
3 not recognize the appearance of a firm or professional
4 corporation unless it is accompanied by the appearance of at
5 least one attorney.

6 So, we would suggest that under the local rules,
7 there needs to be at least one attorney that is identified as
8 counsel of record, particularly because these -- there are
9 pending motions filed by these entities.

10 THE COURT: In this case?

11 MS. JOHNSON: Correct, your Honor.

12 THE COURT: So, you're saying they cannot withdraw?

13 MS. JOHNSON: Correct, your Honor.

14 THE COURT: Okay. Anybody wish to be heard?

15 MR. MORIARTY: Matthew Moriarty for Ameridose.

16 First of all, Mr. Tucker, who is our local counsel,
17 and our firm complied with the Massachusetts Rules of
18 Professional Conduct, specifically, 1.16.

19 THE COURT: But that's not what she's talking about.

20 MR. MORIARTY: I'll get to what Ms. Johnson said.

21 There's no opposition to this by the clients or
22 otherwise.

23 THE COURT: Could you please keep your voice up.

24 MR. MORIARTY: There's no opposition to this by the
25 clients or otherwise.

1 What Mr. Tardio and Mr. Schramek suggested in a
2 response, not an opposition, was that this -- that there be
3 identification of counsel if there was going to be counsel.

4 Settlement has effectively taken Ameridose and GDC
5 and MSM out of this case because of the channeling
6 injunctions. So, in essence, they're over already. Once the
7 cases are actually dismissed pursuant to the PSC's motion to
8 show cause, that will be formalized. They will not be
9 defendants anymore. They do not need to make appearances.
10 So, the Rule that Ms. Johnson is referring to does not apply.
11 They will be third parties and any orders against them as
12 third parties, any discovery directed to them as third parties
13 will take their natural course at that point. There is no
14 obligation for non-parties to have lawyers identified. So, we
15 don't believe that the provision she's citing even applies.
16 Those motions should be granted.

17 THE COURT: Anything else, Ms. Johnson?

18 MS. JOHNSON: No, your Honor. Although I did think
19 that the Tennessee Clinic Defendants and St. Thomas filed
20 responses. I don't know if they wish to be heard on this
21 point.

22 THE COURT: I'm sorry?

23 MS. JOHNSON: I don't know whether the Tennessee
24 defendants may wish to be heard on this point.

25 MR. GIDEON: We would, your Honor, for just a moment.

1 THE COURT: I'll hear you.

2 MR. GIDEON: We ask in the response to the motion to
3 withdraw that they simply designate someone that we may
4 contact with respect to these entities. It doesn't have to be
5 a lawyer, but we don't want to be in a position where we
6 cannot contact these entities, and we just ask that they be
7 required to do that as part and parcel of your order
8 permitting withdrawal. Thank you.

9 MR. MORIARTY: Yesterday I had email correspondence
10 with both Mr. Schramek and with Mr. Tardio, who is Mr.
11 Gideon's partner, and I thought we had this resolved. I
12 identified that --

13 THE COURT: Do you want to talk to him?

14 MR. MORIARTY: -- to the best of our knowledge, there
15 is no successor counsel and, to the best of our knowledge, the
16 information on the Massachusetts Secretary of State's Website
17 is still accurate, and that's what I told them and they seemed
18 satisfied with the response.

19 MR. GIDEON: Well, unfortunately, in terms of the
20 communications, the email I got from Mr. Tardio last night at
21 11 o'clock was still make sure that there is somebody we can
22 contact at each of these entities. So, there must have been
23 some misunderstanding, but that's all we ask, is somebody we
24 can speak to and somebody we can contact at each of these
25 entities.

1 THE COURT: Who else wishes to be heard?

2 MR. GAYNOR: Just briefly, your Honor. My name is
3 Robert Gaynor. I represent the individuals. So, I'm not in
4 the status of --

5 THE COURT: You represent whom?

6 MR. GAYNOR: The individuals.

7 THE COURT: The individual defendants?

8 MR. GAYNOR: That's correct. We have a motion
9 pending to withdraw. We're not in the same category as
10 entities and I believe all of my clients are individually
11 represented with the exception of Mr. Chin, who has criminal
12 counsel who is well aware of this situation and well aware of
13 the motion, and no one has raised any objection --

14 THE COURT: So, what do you want me to do?

15 MR. GAYNOR: I would like you to allow my motion to
16 withdraw on behalf of the individuals.

17 THE COURT: You don't object to that?

18 MS. JOHNSON: We have no objection to that, your
19 Honor.

20 THE COURT: Okay. So, your motion to withdraw on
21 behalf of the individuals is allowed without objection.

22 MR. GAYNOR: Thank you.

23 THE COURT: Anybody else?

24 (No response.)

25 THE COURT: And with respect to the Tennessee

1 defendants and -- I guess it's primarily the Tennessee
2 defendants, I will think about it and try to reconcile your
3 various positions and then rule on the motion.

4 All right. That takes us to Item B.

5 MS. JOHNSON: Yes, your Honor, the report to the
6 Court. No. 4, the status of bankruptcy, we have two items to
7 bring to the Court's attention. The first is that the PSC has
8 filed a motion to appoint Judge Neiman as the appeals
9 administrator. It's a topic that we have addressed with the
10 Court before.

11 THE COURT: I have allowed that.

12 MS. JOHNSON: Excellent. Thank you, your Honor.

13 The second, then, is the post confirmation officer's
14 motion for partial withdrawal of the reference, and I believe
15 Mr. Gottfried would like to address that.

16 THE COURT: Hold on one minute.

17 Here, Lisa, is the motion, ruling on the motion.

18 Okay.

19 COURTRoom DEPUTY CLERK URSo: Okay.

20 MR. GOTTFRIED: Good afternoon, your Honor. Michael
21 Gottfried for the post confirmation officer, Paul Moore.

22 This is really in sort of the nature of a report, in
23 that Mr. Moore's motion to withdraw the reference partially to
24 effectuate the settlement and give life to the tort trust was
25 just referred to you, I believe, on June 22nd. We filed it

1 with the bankruptcy court on June 12th in accordance with the
2 statute. The matter was referred to the District Court for
3 decision and then the matter was assigned to you on the 22nd.

4 So, the period for people to file any responses to it
5 has not yet expired. I'm not anticipating that anybody will
6 oppose this because this is part of the plan and, obviously,
7 there still remains to be several things to be done in the
8 bankruptcy. So, this is only a partial withdrawal of the
9 reference.

10 When the Court has an opportunity to look at the
11 motion, you will see that the specific items that are -- that
12 the Court is going to overseeing are laid out in Paragraphs
13 13(a) through (j) of the motion, which appear beginning at
14 Page 4 of the motion and then move on, you know, through Page
15 10. It's basically -- because under the statutory scheme tort
16 claims must be resolved by the District Court, it basically
17 gives you the power to oversee that process, to appoint
18 Magistrate Judge Neiman non pro tunc, to appoint Ms. Riley non
19 pro tunc, et cetera.

20 So, I just wanted to call that to your attention.
21 Hopefully, there will be no objection in the time period. I
22 would think that it's something that you might be able to rule
23 on without the need for it to pass the --

24 THE COURT: When does the time for objection run out?

25 MR. GOTTFRIED: I believe it's 14 days from June

1 22nd. So -- I haven't quite calculated that out. July 6th,
2 maybe, I'm hearing.

3 THE COURT: Which is it? July what, 4th?

4 COURTRoom DEPUTY CLERK URSo: 6th. 6th, Judge. July
5 6th.

6 THE COURT: July 2nd?

7 MR. GOTTFRIED: 6th.

8 MS. JOHNSON: 6th.

9 THE COURT: 6th.

10 MR. GOTTFRIED: So, we would ask that you act on
11 that, assuming there's no objection, without a further
12 hearing, if that suits the Court.

13 THE COURT: Okay.

14 MR. GOTTFRIED: The only other thing -- and I know
15 this is the bankruptcy portion of the report. The only thing
16 I wanted to make the Court aware of is that, you know, as you
17 know, as a result of the settlement, Mr. Fern is no longer
18 having his services paid for by the insurer and I just wanted
19 to make the Court aware that prior to that occurring, he did
20 perform searches and identified additional documents that
21 relate to the defendants who are actively still defending
22 these cases and placed them into two repositories.

23 Specifically, he identified documents with respect to
24 St. Thomas, St. Thomas Out-Patient Neurological Center,
25 Specialty Surgery, Premier Orthopedic, and Box Hill Surgery

1 Center, and we placed into the repository an additional 68,500
2 pages to U.S. Legal and another 1,375 pages to Russ Omni in an
3 effort to facilitate, hopefully, the proper resolution of
4 those plans.

5 THE COURT: Thank you.

6 MR. GOTTFRIED: Thank you, your Honor.

7 THE COURT: Okay. Insurance actions.

8 MS. JOHNSON: There are two brief reports, your
9 Honor, as to the insurance declaratory judgment actions
10 involving Ameridose that are before Judge Saylor in this
11 district. The status conference for those actions is set for
12 late July. At the last status conference the plan
13 confirmation date had either just passed or was about to pass,
14 so there was an agreement to let things play out for a bit
15 before revisiting.

16 On the second, as to Specialty Surgery Center, I
17 believe Mr. Chalos will address that.

18 THE COURT: Okay. Then State Farm.

19 MR. CHALOS: Yes, your Honor.

20 State Farm is an insurer for one of the Tennessee
21 clinics, not St. Thomas, but a separate clinic. State Farm
22 has filed a declaratory judgment action and as part of that
23 named both the clinic and its -- one of its physicians as well
24 as other parties, including the individual plaintiffs, our
25 clients, as defendants in the declaratory judgment action.

1 So, with the agreement of the plaintiff, State Farm,
2 we went to the District Court, Judge Sharp in Nashville, and
3 asked him to appoint Mr. Stranch and me to serve as lead
4 counsel for the individual defendants, meaning our clients,
5 the victims of the meningitis catastrophe, and the Court -- I
6 don't know if the Court has entered that yet. I don't think
7 so, but it was submitted by agreement. We had notified the
8 Court in a telephone conference that we intended to do that.
9 So, we expect that he'll sign that order.

10 THE COURT: The individual defendants are who?

11 MR. CHALOS: Are the victims and their families. The
12 -- in other words, the plaintiffs in the MDL case are now
13 procedurally defendants in the insurance declaratory judgment
14 action.

15 THE COURT: And has the case made any progress beyond
16 that?

17 MR. CHALOS: No. They just filed it a month or so
18 ago.

19 THE COURT: Okay. All right. Thank you.

20 MS. JOHNSON: That brings us to No. 6, the status of
21 discovery. To bring to the Court's attention, there has been
22 a motion to quash filed by the Massachusetts Board of
23 Registration of Pharmacy. That motion is not --

24 THE COURT: That will go to Judge Boal?

25 MS. JOHNSON: I expected so. That motion is not

1 ripe, but we did want to inform the Court.

2 MAGISTRATE JUDGE BOAL: Yes. And I'm going to
3 schedule it for oral argument on August 5th.

4 THE COURT: Now, the next item I want to skip for the
5 moment and come back to.

6 MS. JOHNSON: Understood, your Honor.

7 I also had one other report that's not the agenda,
8 that I learned this morning that the FDA has produced
9 documents to the U.S. Legal repository. I do not know yet
10 whether U.S. Legal has processed them such that they're
11 available to the other entities, but at least they have made
12 their way to U.S. Legal at this point.

13 THE COURT: Terrific.

14 MS. JOHNSON: That brings us to 6(c), which is just a
15 recognition that the Court has entered an order denying
16 Cumberland Medical's motion to quash. Because that had never
17 showed up on an agenda, I thought we should acknowledge it
18 here.

19 And then that brings us to No. 7, the status of the
20 litigation track, and as to 7(a), I will ask Mr. Fennell to
21 address that with the Court.

22 MR. FENNELL: Your Honor, this is -- is this on?

23 THE COURT: There's a button at the back.

24 MR. FENNELL: This is pursuant to the Court's May
25 28th order listing -- a long list of pending motions that are

1 pending in individual cases within the MDL.

2 The PSC filed its report on Monday. That's Docket --
3 or Document No. 1999, and I would just like to summarize for
4 the Court real quickly, the majority of those motions that
5 were identified in the May 28th order involve cases with
6 allegations against Insight Health Corporation and the other
7 Virginia defendants.

8 Now, since we are now working our way through our
9 settlement process, all of the conditions that have to play
10 out in our settlements, we anticipate that those motions will
11 go away when those cases are dismissed, which should be
12 comparatively soon. So, that will take care of the --

13 THE COURT: Many of them appear to be, more or less,
14 done already by virtue of the settlement.

15 MR. FENNELL: Yes, ma'am. And we're approaching the
16 date where we can dismiss those cases and those will all go
17 away, and that will take care of the majority of the pending
18 motions in the Court's May 28th order.

19 As for the remaining motions, many of them are mooted
20 for several reasons, including settlements and prior orders of
21 this Court addressing motions to dismiss, and the like.

22 The PSC will be contacting counsel for the parties in
23 those cases and asking them to make appropriate filings in
24 their individual dockets to clean up those motions.

25 THE COURT: Okay. Thank you.

1 MR. FENNELL: If it pleases the Court, it would be
2 the PSC's proposal moving forward to review the current case
3 management orders and, if necessary, propose an amendment to
4 the case management orders directing that motions going
5 forward be filed in the central MDL docket. So, it would be
6 easier for the Court to track all of those.

7 THE COURT: I assume for counsel, too.

8 MR. FENNELL: Yes, ma'am.

9 THE COURT: Okay. Thanks.

10 MS. JOHNSON: The Court has issued an order granting
11 the PSC's motion for order to show cause. Thank you for that,
12 your Honor. I think everyone thanks you for that. It
13 resolves a majority of cases in this MDL, we think -- or,
14 rather, will once the dismissals become effective.

15 THE COURT: So, that takes care of Ameridose's motion
16 and PSC's motion as well.

17 MS. JOHNSON: I believe so, yes. Does Mr. Moriarty
18 agree?

19 MR. MORIARTY: We do.

20 THE COURT: Okay.

21 MS. JOHNSON: One thing I did want to point out to
22 the Court there. I think Mr. Fennell has alluded to it, but
23 just to say it expressly. The PSC's proposed order seeking
24 the motions to show cause did not cover the Virginia
25 defendants' settlement for reasons that are particular to the

1 Virginia settlement, but there will be in appropriate time
2 motions filed with this Court to address the remaining cases
3 involving Insight.

4 THE COURT: Okay. Pro se liaison.

5 MS. JOHNSON: Ms. Martin asked me to report to the
6 Court that she has no activity to report this month.

7 THE COURT: Imagine, all the pro se's went away.

8 MS. JOHNSON: Finally, that brings us to No. 9, the
9 status of appeals. There is technically an appeal still
10 pending in the First Circuit, although that has been
11 functionally, if not officially, stayed pending the resolution
12 of the settlements.

13 THE COURT: And the next dates we have already
14 previously agreed to, yes?

15 MS. JOHNSON: Yes, we have, your Honor. If possible,
16 we would like to set the schedule for the October conference.

17 THE COURT: Sure.

18 MS. JOHNSON: I would suggest sometime the second
19 week of October, if that works for the Court.

20 COURTROOM DEPUTY CLERK URSO: Yes, it does. Would
21 Tuesday, Wednesday or Thursday...

22 MS. JOHNSON: I think Wednesday usually works well.

23 COURTROOM DEPUTY CLERK URSO: Wednesday, October
24 14th, at 2:00.

25 THE COURT: Does that work for you?

1 MAGISTRATE JUDGE BOAL: Yes.

2 MS. JOHNSON: That works for the Plaintiffs' Steering
3 Committee.

4 THE COURT: And you will, as usual, let me know
5 whether there are motions to be heard either before or after
6 the status conference?

7 MS. JOHNSON: Yes, your Honor.

8 THE COURT: On that day.

9 Okay. Now, that brings me to (C), when I really
10 wanted to talk to you about some issues.

11 Judge Boal and I sat down together for a lengthy
12 conference to try to figure out, really, how we should manage
13 the cases from here on in, and as we were talking, it occurred
14 to us that there really only -- it seemed to me that there are
15 really only two possibilities:

16 One is that the cases are tried here with lexicon
17 waivers or that the cases go back if there are no waivers, and
18 that our trying to set up a trial schedule without
19 understanding what the defendants are planning to do with
20 respect to those waivers doesn't seem to make a lot of sense
21 and it makes a lot of anxiety, not only for counsel, but also
22 for the Court. We don't know where we're going to go.

23 And so, what I propose is that the defendants, within
24 a very short time, make a choice as to whether they want to --
25 whether they're going to waive or not. If they don't waive,

1 we will proceed with the common discovery, fact discovery and
2 expert discovery and get it done as quickly as we can, which I
3 think should be early next year, at the latest, and then the
4 cases would be sent back for trial to their original
5 jurisdictions.

6 If there are waivers, then we will proceed, perhaps
7 in a slightly faster fashion, with the common discovery, move
8 on to individual discovery of the individual cases in the
9 order in which they are set up, having in mind both the
10 desires of the defendants and the plaintiffs as to the order
11 in which they should be done, and then I think we're in a
12 somewhat sort of Bellwether situation, but to talk about
13 Bellwether trials now, without knowing who is going to try
14 them, just doesn't seem to make a lot of sense.

15 So, I propose to enter an order that spells out the
16 details of what I have only very broadly sketched now and
17 would like your -- it is an order, but I, nonetheless, request
18 any input from all parties so that we can fine tune the order,
19 if necessary, and that is why I wanted to skip over some of
20 the other things that you were talking about, including Mr.
21 Reed. I do not know where that case is going to be tried now.
22 So, to say it's going to be tried on a particular day is
23 really not a very useful exercise.

24 MR. NOLAN: Your Honor, George Nolan.

25 I would like to point out one thing. Your Honor,

1 there is a third alternative I don't think that the Court has
2 considered, which is that the Court does have statutory
3 authority to try cases here against these defendants pursuant
4 to 28 U.S.C. Section 157(b) (5). Your Honor, that is the
5 statute that authorizes courts in -- district courts in cases
6 where a bankruptcy proceeding is pending to hear the tort
7 claims that affect that particular bankruptcy proceeding. So,
8 I guess I would, very respectfully, on Mr. Reed's behalf,
9 encourage the Court to take a look at that particular statute.

10 THE COURT: Do you prefer to be here?

11 MR. NOLAN: Your Honor, we would be happy to try the
12 cases here and we would prefer to try the case here if that
13 results in a more swift trial schedule.

14 THE COURT: Well, that is one thing. The other thing
15 is that there were a number of cases that were originally
16 filed here, not only the bankruptcy court, but here, and those
17 need to be considered as well.

18 MR. NOLAN: Certainly.

19 And another very respectful suggestion, your Honor,
20 is that we think the best way for the Court to posture this
21 case to move forward more efficiently is to address soon the
22 legal issue that is bogging down the case, and that is the
23 issue of whether joint and several liability will apply to the
24 claims against these defendants.

25 Now, two days ago --

1 THE COURT: Joint and several liability among whom?

2 MR. NOLAN: Among the tort-feasors that are presently
3 in the case, and here's --

4 THE COURT: But not including -- I mean, as I
5 understand it, either -- yes, Tennessee defendants have some
6 kind of what they call comparative fault, but isn't really
7 comparative fault.

8 MR. NOLAN: That's right. What the Tennessee
9 defendants want to do at trial is blame empty chairs. They
10 want to ask the jury to attribute fault to parties that have
11 already settled or parties who are immune from suit, such as
12 the FDA and the Massachusetts Board of Pharmacy.

13 Now, two days ago the PSC filed a brief on the choice
14 of law question at the Court's request and has explained in
15 that brief, under the applicable cases and choice of law
16 rules, Massachusetts law should apply to the issue of whether
17 the clinics who chose NECC as their supplier of steroids and
18 sold and distributed those products to their patients, whether
19 they can be held jointly and severally liable for the harm
20 caused by the product.

21 So, the PSC in that brief explains that under the
22 applicable choice of law rules, Massachusetts law of joint and
23 several liability should govern that particular issue.

24 Now, if the Court agrees with the PSC's position,
25 then this onslaught of comparative fault discovery in which

1 we're becoming mired becomes unnecessary.

2 THE COURT: Now, you have -- you're relying on your
3 motion concerning choice of law to resolve this issue?

4 MR. NOLAN: In part, yes, your Honor. Under the
5 Court's present briefing schedule, the briefing will be
6 thoroughly complete next month on that particular issue.

7 Now, it's also important for the Court to understand
8 that if the Court does not agree with the PSC and does not
9 apply Massachusetts law of joint and several liability to
10 these claims, then the Court will need to make another
11 decision, and that is that in Tennessee, although that state
12 has generally abolished the doctrine of joint and several
13 liability, it has retained it in certain contexts. In
14 particular, under the Tennessee product-liability statute.

15 So, it's the plaintiffs' position that the doctrine
16 of joint and several liability does apply to the plaintiffs'
17 product-liability claims and that these defendants are not
18 allowed to reduce their degree of responsibility by trying to
19 attribute fault to parties associated with NECC, because under
20 Tennessee law, because these defendants sold and distributed
21 this product in Tennessee, they are required to stand behind
22 the product and be responsible for all harm caused by the
23 product.

24 Now, obviously, the Tennessee defendants disagree
25 with the plaintiffs on this particular issue, but that is an

1 issue, your Honor, that if it -- depending upon how it comes
2 out, it may make this onslaught of comparative fault discovery
3 unnecessary. So, we encourage the Court to resolve that issue
4 as soon as possible.

5 So, I think it could be a one-step process, depending
6 on where the Court comes down on the choice of law question,
7 or it could be a two-step process if the Court determines it
8 needs to dig a little bit more deeply into Tennessee law, but
9 that's something that the parties can help the Court with, and
10 the outcome will be very important to how much of this current
11 discovery is necessary.

12 MR. GIDEON: Your Honor --

13 THE COURT: What about the cases filed in this
14 district, not the bankruptcy cases, but there were a bunch
15 that were filed directly in the District Court.

16 MS. JOHNSON: Yes, your Honor. There are a number
17 that I can think of. It's unclear to me right now how many
18 that will be once all the settling defendants are dismissed,
19 but I know I have at least one. So, I know there will be
20 something here that would require this Court to try if it is
21 not otherwise settled.

22 I would point out also, I think, your Honor, you
23 identified two possibilities: Lexicon waiver and trial here
24 or no waivers and trial in Tennessee.

25 Mr. Nolan raised a third possibility that I think is

1 important for us to explore and if the Court would like a
2 short brief on it, we're happy to submit that, which is
3 whether --

4 THE COURT: This is the bankruptcy issue.

5 MS. JOHNSON: -- because these cases were transferred
6 here under 157(b), there may be jurisdiction under 157(b).
7 It's an issue the PSC has been looking at. I wouldn't want to
8 give you a position today, but I think Mr. Nolan is on point
9 to suggest that we look at that issue. There is then a fourth
10 possibility --

11 THE COURT: Well, I would appreciate a memorandum on
12 that, and then any opposition by Tennessee, I assume.

13 MS. JOHNSON: Should we say ten pages, your Honor?

14 THE COURT: Fine.

15 MS. JOHNSON: Okay. There is a fourth possibility
16 and I hate to add to the mix, but I want to make sure all of
17 those options are on the table as we plot a course forward.
18 The fourth is that this Court could actually sit by
19 designation in Tennessee to preside over these cases.

20 THE COURT: I have considered and rejected that.

21 MS. JOHNSON: Okay. Well, then there are only three
22 options.

23 I will also say, I think that the Court's suggestion
24 that we decide this issue is a good one and I think it will
25 help us move things forward, but I also --

1 THE COURT: It will help Judge Boal, too, because now
2 it's such a mishmash, it's very difficult and she's done an
3 extraordinary job of keeping you going, but until we get
4 clarity as to trials, to run a schedule is really quite
5 impossible, and we can't even begin to talk about Bellwether
6 trials until we have some understanding of the question that
7 we have just been talking about now.

8 MS. JOHNSON: Yes, your Honor.

9 I would say two quick things also. We agree with Mr.
10 Nolan that the choice of law issue is very determinative of
11 what the future path of this litigation looks like as well.

12 And, finally, that the PSC had injected a concept in
13 earlier briefing of the notion of cases being pretrial ready
14 by a certain date.

15 If we do wind up in a situation where cases are going
16 to wind up being sent back to Tennessee, for example, it may
17 still be appropriate for the Court to set deadlines by which
18 the case should be fully worked up and ready to go and trial
19 ready.

20 THE COURT: Well, it seems to me the only thing left
21 to do when they go back is the individual, essentially,
22 medical discovery with respect to the plaintiffs. Is there
23 more than that?

24 MR. STRANCH: No, your Honor. The PSC's position
25 would be that when the case -- if the cases do get sent back,

1 they are sent back trial ready. So that when the case arrives
2 back in Tennessee, there would just be the -- all that would
3 need to be done is a trial date picked and the case would go
4 to trial. So --

5 THE COURT: No discovery of the individual
6 plaintiffs' causation?

7 MR. STRANCH: That would go forward here as part of
8 the larger issue, because if the Court -- if there's 88
9 plaintiffs that want to raise causation issues on summary
10 judgment, defendants want to raise causation issues on summary
11 judgment, there is still the benefit of having this Court to
12 set down and look at it as a whole, because your ruling on one
13 summary judgment motion, just like on the motion to dismiss at
14 the beginning, will inform what happens with all the other
15 cases. And so, that should all be done as part of this and
16 when the cases are sent back, they're sent back trial ready.

17 THE COURT: But how can I rule on summary judgment
18 with respect to causation?

19 MR. STRANCH: The individual discovery would all go
20 forward here in the MDL as well.

21 THE COURT: Is that agreed by all parties?

22 MR. GIDEON: Absolutely not. We respectfully
23 disagree with the last 17 minutes, 20 minutes.

24 THE COURT: Well, even if you do disagree, I think it
25 is the individuals -- the additional individual discovery

1 concerning causation that should be done with great speed.

2 MR. GIDEON: Absolutely, I concur with that.

3 THE COURT: I mean, like maybe two weeks.

4 MR. GIDEON: Well, with 130-some cases, two
5 weeks might be ambitious.

6 THE COURT: Well, they're not all going to go to
7 trial at the same time.

8 MR. GIDEON: Right.

9 But with respect to what you have heard thus far
10 today, we've also looked at the issue of whether Section
11 157(b) (5) has any application now that the bankruptcy is
12 largely completed. It's closed as of June 4th. And this
13 Court's decision in *Quincy Medical Center*, January 5th, 2015,
14 tells me that it has precious little application to continue
15 jurisdiction here.

16 The scenario Mr. Nolan talks about, Mr. Stranch talks
17 about is principally Tennessee plaintiffs suing Tennessee
18 healthcare providers for injuries that occurred in Tennessee,
19 and we respectfully submit that while common discovery should
20 be completed here, truly common discovery, the rest of the
21 cases should be remanded to Tennessee, and we question whether
22 there is continuing federal jurisdiction. There is no
23 diversity. There's no federal question.

24 THE COURT: Well, let me suggest --

25 MR. GIDEON: That's an open issue.

1 THE COURT: -- that the plaintiffs file a brief on
2 this question by -- ten days from now and then the defendants
3 who wish to respond can have ten days to respond after that,
4 and then maybe what we can do is have oral argument on it at
5 the next conference in August, I think.

6 MR. GIDEON: Okay.

7 THE COURT: I've forgotten now when it is.

8 MAGISTRATE JUDGE BOAL: August 5th.

9 THE COURT: August 5th. So, we can stretch out the
10 schedule in such a way that we're ready to have argument. I
11 think it's an important issue. I welcome your input. And I
12 think it may still be a good idea to try to go forward with
13 the suggestion I had made or think about it and we'll make a
14 final decision after I have considered the 157 whatever
15 argument that you make.

16 And, also, please add to this what should happen if
17 there are any Massachusetts-filed cases in any number. If
18 there's just one, then we obviously don't worry too much about
19 it, but it will help in structuring the discovery and the
20 disposition of these cases if we can get this resolved. So, I
21 thank you all for that.

22 MS. GREER: Your Honor, if I may. Marcy Greer for
23 the St. Thomas Entities. And just a couple of quick points:

24 One is that I believe there are very, very few cases
25 from Tennessee that have been filed in federal court

1 originally in Massachusetts. I think there are only --

2 THE COURT: Well, you can mention that in your brief
3 and tell me that they are still in a different place from all
4 the others.

5 MS. GREER: Okay.

6 THE COURT: But there's no sense in having argument
7 on it now because we haven't really -- I, frankly, haven't
8 thought about this particular question that was raised at the
9 bankruptcy and the reference to bankruptcy.

10 MS. GREER: Sure. And we would appreciate the
11 opportunity to be heard on that.

12 We would also appreciate that the Court give us the
13 opportunity to be heard on the choice of law issues. They've
14 gotten a chance to now go in and make all their arguments --

15 THE COURT: Appreciate being heard on what?

16 MS. GREER: The choice of law issues.

17 THE COURT: Well, that's the issue. That is what
18 gives rise to a lot of this now.

19 MS. GREER: But they're suggesting --

20 THE COURT: The bankruptcy and the choice of law
21 issues are the ones that we're now talking about now, I think.

22 MS. GREER: Yes, your Honor, that's true, but they're
23 suggesting that the choice of law issues go -- well, if they
24 are ripe and Massachusetts applies, joint and several
25 liability applies, that there's no need for this comparative

1 fault discovery. That's not true. As we briefed in our
2 three-page brief that we filed earlier --

3 THE COURT: That Judge Boal will take care as it
4 arises.

5 MS. GREER: Okay. But they have represented that it
6 will make it go away and we wish to be heard on that.

7 THE COURT: Oh, I know. What's next, Ms. Johnson?

8 MS. GREER: Thank you, your Honor.

9 MS. JOHNSON: Well, your Honor, I had one question I
10 think for the Court. I think you had suggested earlier that
11 you may file an order or a proposed order on lexicon.

12 THE COURT: Well, I wonder whether I should do that.
13 It may be helpful if I do something like that simply to tell
14 you where I am, having not thought about the bankruptcy fillip
15 that you just raised. So, I'll call it something.

16 MS. JOHNSON: I just wanted to tell the Court, I do
17 think that would be helpful --

18 THE COURT: Yes.

19 MS. JOHNSON: -- to have that, if that's possible.

20 THE COURT: Okay. Really, the object of this is to
21 get a framework for Judge Boal to deal with the discovery.
22 It's very difficult now. And to get some final date when the
23 trials can begin as soon as possible.

24 MR. STRANCH: Your Honor, I apologize. I'll be very
25 brief.

1 I just wanted to ask you a clarification question to
2 make sure we're addressing exactly what you want. You would
3 like a ten-page brief from us in ten days that addresses --

4 THE COURT: Ask Mr. Nolan. He suggested it.

5 MR. STRANCH: Okay.

6 MR. NOLAN: I understand, your Honor.

7 MR. STRANCH: Okay. We're good.

8 THE COURT: You'll tell him, right?

9 MR. NOLAN: I'll fill him in.

10 THE COURT: Maybe you can tell all of us exactly what
11 you have in mind and --

12 MR. NOLAN: What I understand is you've asked for a
13 brief within ten days addressing the issue on whether under 28
14 U.S.C. Section 157(b) (5), this Court could try the cases in
15 this courtroom.

16 THE COURT: Regardless of lexicon?

17 MR. STRANCH: Right.

18 MR. NOLAN: That's right, regardless of lexicon.

19 THE COURT: Okay. That's the essential issue.

20 And I think with that and lexicon and -- or sending
21 the cases back and then also resolving the choice of law issue
22 having to do with what they erroneously called comparative
23 fault should clear the decks, right? Clear the air.

24 Okay. Now we continue with your suggestion under

25 Part C.

1 MS. JOHNSON: Thank you, your Honor.

2 I think that brings us -- that functionally addresses
3 everything that we listed in No. 11, the motions for pretrial
4 schedules. So, I think that brings us to No. 12, which is
5 Ameridose's motion for protective order and to quash a
6 deposition notice.

7 THE COURT: Is this something that we're hearing
8 today?

9 MAGISTRATE JUDGE BOAL: I guess I'm not quite sure
10 why we're having additional argument. It seems as if the
11 issues are all the same as what was discussed at the hearing
12 before me last month.

13 MR. MORIARTY: In all fairness to the St. Thomas
14 Entities, you allowed me to argue --

15 THE COURT: Excuse me. Why don't you sit down and
16 pull the thing down. It's much easier.

17 MR. MORIARTY: -- you allowed me to argue, even
18 though their brief in opposition had not been filed. So,
19 actually, to be efficient, the ball would be in their court to
20 decide if they want to talk about this today before both of
21 your Honors and then I would get a brief opportunity to reply.

22 MAGISTRATE JUDGE BOAL: But I think your motion
23 raised -- it's, obviously, a different movant, but the same
24 issues that were raised by other entities, and I understand
25 St. Thomas and the Tennessee Clinics' position on it. I just

1 have to decide which side I agree with.

2 MR. MORIARTY: Well, actually -- and I don't mean to
3 cut you off, Marcy, but we originally joined the individuals'
4 motions on the Fifth Amendment issue. We filed a separate
5 motion for protective order because there are other issues
6 regarding Ameridose and what we consider to be the law of
7 Tennessee.

8 MAGISTRATE JUDGE BOAL: In fact, I read your motion
9 and the opposition before I got here today and I don't think I
10 need any further argument.

11 MR. MORIARTY: Okay. And then we filed a reply -- a
12 motion for leave to file a reply brief.

13 MAGISTRATE JUDGE BOAL: And it was granted this
14 morning.

15 MR. MORIARTY: Yes. Do you need us to refile --

16 MAGISTRATE JUDGE BOAL: No.

17 MR. MORIARTY: -- what we already filed as Exhibit A?

18 MAGISTRATE JUDGE BOAL: That is the custom in this
19 courthouse.

20 MS. JOHNSON: I think, your Honor, then, we have
21 heard argument -- Judge Boal has heard argument on all of the
22 remaining motions listed under (C). So, that brings us all
23 the way to (D) on Page 5.

24 There are just a few things that I would bring to the
25 Court's attention there in anticipation of next time. We've

1 mentioned the Massachusetts Board of Pharmacy's motion. There
2 is also a motion by Ameridose to destroy 100 pallets of paper
3 records. That is not yet fully briefed, but will be next
4 time.

5 And, finally, there are two substantive motions to --
6 every motion to dismiss is substantive. I don't know why I
7 said that. There are two motions to dismiss that I believe,
8 although counsel still -- and one of them still addresses the
9 schedule. I believe those will be ready for next time. So,
10 there may be substantive motions to be heard next time around.

11 THE COURT: Okay.

12 MS. JOHNSON: And that's it.

13 THE COURT: Is that it for the PSC?

14 MS. JOHNSON: That's it, your Honor.

15 THE COURT: Does anybody else have any issues to
16 discuss that we have not already discussed?

17 Somebody on the telephone? It was a bird.

18 Thank you all. And I will see you in July.

19 MS. JOHNSON: August, your Honor.

20 THE COURT: August. August.

21 MS. JOHNSON: Thank you, your Honor.

22 MR. STRANCH: Thank you, your Honor.

23 THE COURT: And I thank you for your assistance and
24 also for the briefing that I look forward to. Court is in
25 recess.

1 (Adjourned, 2:51 p.m.)
2
3
4 C E R T I F I C A T E
5
6 I, Catherine A. Handel, Official Court Reporter of the
7 United States District Court, do hereby certify that the
8 foregoing transcript, from Page 1 to Page 41, constitutes to the
9 best of my skill and ability a true and accurate transcription of
10 my stenotype notes taken in the matter of No. 13-md-2419-RWZ, In
11 Re: New England Compounding Pharmacy, Inc., Products Liability
12 Litigation.
13
14

June 28, 2015
Date

/s/Catherine A. Handel
Catherine A. Handel, RPR-CM, CRR

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